IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 21, 2009 Session

STATE OF TENNESSEE v. ROBERT N. HELTON

Direct Appeal from the Circuit Court for Bedford County
No. 16219 Franklin Lee Russell, Judge

No. M2007-02873-CCA-R3-CD - Filed December 2, 2009

A Bedford County jury convicted the Defendant, Robert Norman Helton, of vandalism, burglary and theft of property, and the trial court sentenced him to twenty-seven years in the Tennessee Department of Correction. The Defendant appeals, arguing that the evidence is insufficient to support his convictions and that the trial court erred when it set the range and length of his sentence. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH, and THOMAS T. WOODALL, JJ., joined.

Robert L. Marlow, Shelbyville, Tennessee, for the Appellant, Robert Norman Helton.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Deshea Dulany Faughn, Assistant Attorney General; Chuck Crawford, District Attorney General; Michael D. Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the burglary, theft and vandalism of a farm property in Bedford County. The Bedford County grand jury indicted the Defendant for burglary, theft over $10,000, and vandalism under $500. At the Defendant's trial on these charges, the following evidence was presented: James Pope testified that he and his wife, Candy Pope, owned a 165-acre farm property on Mullins Mill Road in July of 2006. The property was completely fenced in with a gated entryway that was locked when no one was on the property. A storage barn was located on the property approximately three-quarters of a mile back from the gated entryway. Mr. Pope also testified that the Defendant worked on this property, first as part of a crew hired to put in horse paddocks and then independently to do various tasks around the property in late April or May of 2006.

Candy Pope testified that she fired the Defendant and described the termination as "not under the friendliest of terms." Mrs. Pope told the Defendant not to return to the property because he failed to complete the job he had been paid to perform. She spent two weeks "chasing him down" before she was able to recover a key to the front gate, diesel fuel, and a weed eater the Defendant had taken from the property.

James Pope testified that he was at the Mullins Mill Road property on July 14, 2006, until approximately 6 p.m., at which point he locked the gate and left. He recalled that, as he left the property, "Everything was as it was expected to be, intact and locked." Mr. Pope testified that no one had permission to enter the property or take any items. On the morning of July 15, 2006, Mr. Pope received a phone call regarding the Mullins Mill Road property. He immediately went to the property and discovered it in a different condition than the previous evening. The gate was off the hinges and knocked down, and the post was broken. Mr. Pope then discovered that a black sixteen-foot trailer, normally parked outside the barn, was missing. Inside the barn, Mr. Pope found that two four-wheelers, a new riding lawn mower, and a new weed eater were also missing. After surveying his property, Mr. Pope reported the damage and theft to the sheriff's department.

Mr. Pope testified the front gate was repaired at the expense of about $200, which included labor and materials. He estimated the value of the trailer at $1500. Mr. Pope estimated the combined value of the two four-wheelers was between $8,000 and $9,000. Mr. Pope testified the riding lawn mower was less than a month old and purchased for $1950, and that he paid $269 for the weed eater. Insurance covered the four-wheelers, riding lawn mower and weed eater and the insurance company assessed a total replacement value for these items of almost $15,000.

Bobby McCullough, the Defendant's friend, testified that the Defendant was at McCullough's home "hanging out drinking beer and stuff" on the night of July 14, 2006. The Defendant and McCullough then drove around for a few hours in the Defendant's Yukon. The Defendant told McCullough he had a job for the two of them. He further explained to McCullough that they would go to the Defendant's prior work place and load up some four-wheelers for his boss. McCullough indicated he was interested, and they drove to the farm property on Mullins Mill Road. It was dark when they arrived at the gated property. McCullough testified that the Defendant tore down the gate and then drove to an unlit barn. They first unloaded a sixteen-foot trailer full of lumber and connected the trailer to the back of the Defendant's Yukon. They then backed the trailer into the barn and loaded two four-wheelers, a lawn mower, and a weed eater. At this point, McCullough began to think something was not right about the situation, but he was afraid to say anything to the Defendant because he had seen the Defendant become violent at times. As they were leaving the property, the trailer tire hit a fence post and blew out the trailer tire.

McCullough testified that he and the Defendant drove to a residence on Flat Creek where they unloaded the lawn mower and weed eater. A big, heavy-set man with a gray beard, whom McCullough did not know, met them and paid the Defendant $250 or $300 for the lawn mower. An arrangement was made for additional money for the weed eater to be paid later. The Defendant and McCullough then drove to McCullough's house with the two four-wheelers and the trailer. Upon

arriving at McCullough's, the Defendant and McCullough got into McCullough's vehicle and drove back down the road to recover one of the four-wheelers, which had fallen from the trailer. They brought the four-wheeler back to the house, where a group of people were drinking beer. One of the people at McCullough's house was Travis Mills. McCullough talked with Mills about purchasing the larger of the two four-wheelers for $300. Mills agreed to buy it and paid McCullough, and because the four-wheeler was stolen, they painted the four-wheeler before Mills took it off the property.

According to McCullough, the Defendant drove back to McCullough's the next day in a black Dodge pick up and loaded the remaining four-wheeler into the truck. The Defendant told McCullough he was going to sell it. That evening McCullough sold the trailer to a "boy in town" named Chris for $100. McCullough said he had not seen any of the stolen property since then.

McCullough testified that he and Mills were recently at a convenience store in Bedford County where they saw the Defendant. As they were leaving, the Defendant pulled up to them in a black S-10 and threatened to kill McCullough when the trial was over.

On cross-examination, McCullough acknowledged that he told Detective Chris Brown the following version of the story in August 2006: He said the Defendant asked him whether he wanted to buy a trailer for $150 and/or a four-wheeler for $300. McCullough told the Defendant he did not have the money but asked the Defendant to check with him later. Accordingly, the Defendant came by McCullough's home later and McCullough bought the trailer but not a four-wheeler. While McCullough was away from his home, the Defendant brought the trailer and left it. Three days later McCullough sold the trailer to someone else for $100. McCullough stated that he told the Detective this because he was trying to keep "everybody out of trouble." McCullough acknowledged that he then gave a second statement in January of 2007. The second statement was consistent with his trial testimony, although it did not include McCullough's acknowledgment that he helped paint the four-wheeler sold to Travis Mills.

Travis Mills, McCullough's friend, testified he was drinking heavily with a group of friends at McCullough's home the night of July 14, 2006, and "passed out two or three times." He testified that he arrived intoxicated and went inside McCullough's home and passed out. When he awoke, he went outside and a trailer carrying two four-wheelers was in the yard. The Defendant and McCullough asked if anyone wanted to purchase a four-wheeler for $300. Mills said he did and gave the money to McCullough. Mills then went and purchased some black spray paint and someone whom he did not recall painted the four-wheeler. The four-wheeler was loaded into Mills's truck, and he left. The next morning when he saw the four-wheeler, he became concerned that it might be stolen, so he sold it to someone else for $300.

Mills testified that, several weeks before trial, he went to a convenience store with McCullough. As they were leaving, the Defendant pulled up in a small black truck and spoke angrily to Mills and McCullough, but Mills did not hear the substance of the Defendant's statements.

Rebecca Stringer and the Defendant share a child together. She testified that she dated the

Defendant from June 2006 until November of 2006 and described the relationship as "rocky." On the night of July 14, 2006, Stringer met up with a friend, Kim Rodgers, after work. Stringer called McCullough's phone to find out where the Defendant and McCullough were. The Defendant told Stringer that he was with McCullough and would see her later at McCullough's home. Later that evening, Rodgers took Stringer over to McCullough's home, where she waited outside an hour or two for the Defendant. While she waited she became upset and attempted to contact the Defendant again. The first phone call was answered by McCullough and he was "short" with her and told her the Defendant would call her back. When the Defendant did not return her call, Stringer called again and spoke with the Defendant, and he said he was busy and told her to stop calling. She continued calling but the phone went straight to voice mail.

When the Defendant pulled up to McCullough's home in his Yukon, he was pulling a trailer carrying a weed eater and a four-wheeler. Stringer approached the Defendant and asked where he had been, and the Defendant told her he would talk to her later. The Defendant and McCullough got into McCullough's truck and left again. They were gone approximately ten minutes and returned pulling a four-wheeler with a chain. Again, Stringer attempted to speak with the Defendant, but he said he would talk to her after he showered. When he returned, they engaged in a heated argument over what the Defendant had been doing and why he was non-responsive to Stringer's phone calls. In response to any questions regarding the trailer, weed eater and four-wheelers, he said he did not want to talk about it and told her "not to worry about it." Stringer left with Rodgers and went home.

Later that evening the Defendant went to Stringer's home and again refused to discuss what he had been doing that evening but told Stringer not to tell anyone what she had seen at McCullough's home. The next day, the Defendant told Stringer that the items came from his previous employer, the Popes, who owed him $75, and that this was payback for not giving the Defendant his money. The Defendant showed Stringer that he had a key to the gate but explained that he did not use it because the Popes would then know it was him.

Some time later, the Defendant asked Stringer to go with him to speak to Detective Bonner at the sheriff's department. At first Stringer refused, but, because the Defendant threatened her and her family, she went with him. She told Detective Bonner that the Defendant was with her the night of July 14, 2006. Stringer testified that she did not lie to the Detective but admitted that she did not tell the Detective everything because she was scared. In January of 2007, Stringer sought an order of protection against the Defendant based upon threats regarding her testimony in this case. A few months before trial, Stringer gave a written statement to the sheriff's department.

Kimberly Rodgers testified that she drove Stringer to McCullough's house on July 14, 2006, so that Stringer could talk with the Defendant. When they arrived, the Defendant was not there, so they waited outside. When the Defendant finally arrived, he was pulling a trailer carrying a four-wheeler and a weed eater and he told them he needed to go back down the road where a four-wheeler had fallen off the trailer. McCullough and the Defendant left in McCullough's truck and returned shortly with a four-wheeler. Stringer tried repeatedly to speak with the Defendant, but he kept telling her to wait, so Stringer and Rodgers decided to go back to Stringer's home. While Rodgers was at

Stringer's, the Defendant arrived. Rodgers decided to leave to let the Defendant and Stringer talk, and, on her way out, the Defendant told Rodgers that if she told anybody about what she had seen at McCullough's he would hurt her. He told her that a girl would beat her up.

Detective James Bonner was assigned this case. He testified that two of the stolen items were recovered. The trailer was recovered and traced back to McCullough and a four-wheeler was recovered and it was traced back to Mills.

The Defendant testified that the first time he became aware of the vandalism, burglary, and theft of the Pope's farm property was when Detective Bonner approached him about it. He admitted he went to McCullough's home on the night of July 14, but he said a trailer was already there when he arrived. He had spent the day cleaning his father's fuel tank and showed up at McCullough's around 9 p.m. or 10 p.m. The Defendant and Stringer entered an argument over where he had been, so they both left McCullough's to go to Stringer's home.

The Defendant denied any involvement in this incident. He then explained that Stringer's testimony was false and that she lied in an attempt to keep their child from him. He stated that he never made threats to harm Stringer. He also testified that McCullough's testimony about the Defendant making a threat at the convenience store was false. In recounting this incident, he stated that he and his nephew pulled up at the convenience store, and he pointed out McCullough to his nephew as the person "lying on me." The Defendant said that, because McCullough was looking at him and laughing, he said to McCullough, "That's all right, it will all come out in court." The Defendant testified that McCullough and Mills were familiar with the Pope's property because the Defendant had taken them to the property to fish on a river that borders the back side of the property before this criminal incident.

The Defendant testified he used the four-wheelers and riding lawn mower while employed by the Popes. He would get the keys from Mrs. Pope when he needed to use one of them. He was given the key to one of the four-wheelers that he kept on a key ring for a period of time but he returned it to Mrs. Pope before he finished working for them. The Defendant admitted he has two fraud convictions, two reckless endangerment convictions, and one evading arrest in a vehicle conviction.

The only evidence presented to the jury at this trial was testimonial evidence. During deliberation, the jury produced two questions to the trial court: (1) "Was the testimony from the four witnesses evidence or hearsay?"; and (2) "Do we vote on evidence or what was said?" The trial court, defense counsel, and assistant district attorney all discussed the questions and constructed a response that was returned to the jury.

The jury convicted the Defendant of vandalism under $500, a class A misdemeanor, burglary, a class D felony, and theft over $10,000, a class C felony. At the sentencing hearing, the trial court sentenced the Defendant to eleven months twenty-nine days for the vandalism conviction. For the felony convictions, the trial court considered the Defendant's six prior felony convictions. The six felony convictions were: two class E felonies for forgery committed on consecutive dates; two class

E felonies for reckless endangerment with a vehicle, and a class D felony for evading arrest in a motor vehicle with risk of harm, all arising from the same criminal episode; and a class D felony for theft over $1000. After consideration of the Defendant's prior convictions, the trial court sentenced the Defendant as a career offender, to twelve years for the burglary charge and as a Range III, persistent offender, to fifteen years for the theft charge. The trial court ordered the vandalism charge and burglary charge to run concurrently and the theft charge to run consecutively to the other convictions for a total effective sentence of twenty-seven years. It is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant argues there is insufficient evidence to support his convictions. Specifically, the Defendant argues that, because of the jury's questions during deliberations, "the jury may have convicted [the] [D]efendant based upon what counsel stated or argued, or what the court may have spoken, not on the testimony of the witnesses-the only evidence they should have considered." Further, he argues that the trial court erred when it set his range and length of sentence.

A. Sufficiency of the Evidence

The Defendant asserts that, in light of the jury's questions during deliberations, the evidence at trial was insufficient to sustain his convictions for burglary, theft, and vandalism. The Defendant argues that the questions indicated confusion on the jury's part and that, thus, the conviction could not be based upon the jury's belief in the Defendant's guilt beyond a reasonable doubt. The State contends that the evidence presented at trial was sufficient for a jury to return convictions for burglary, theft and vandalism.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted). In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions

concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

A conviction for a class D burglary requires proof that the defendant, without the effective consent of the property owner, entered a building other than a habitation not open to the public, with the intent to commit a felony, theft, or assault. *See* T.C.A. §§ 39-14-402(a)(1) (2006). A class C felony theft of property requires the state to prove the Defendant: (1) knowingly obtained or exercised control over the property of another; (2) did not have the owner's effective consent; (3) intended to deprive the owner of the property; and (4) the value of the property is not less than $10,000 or more than $60,000. *See* T.C.A. § 39-14-103 (2006); T. C.A. § 39-14-105(4) (2006); *State v. Amanns*, 2 S.W.2d 241, (Tenn. Crim. App. 1999). A class A misdemeanor vandalism requires proof that the Defendant: (1) knowingly caused damage or destruction to any real or personal property of another; (2) without the owner's effective consent; and (3) the property is valued at $500 or less. *See* T.C.A § 39-14-408(a) (2006); T.C.A. § 39-14-105(1) (2006).

The Defendant attempts to tie the questions raised by the jury during deliberation to the issue of whether the State produced sufficient evidence to convict the Defendant of burglary, theft, and vandalism. Based upon the record before us, the trial court, the assistant district attorney, and defense counsel reviewed the jury's questions and collectively agreed upon the response given to the jury. The response to the jury is not included in this record, but the burden is upon the appellant to provide a complete and full record of the trial court proceedings for review. Tenn. R. App. P. 24 (2008). Because we can not review the response, we presume the response resolved the jurors' questions. Further, our review of the evidence presented at trial shows sufficient evidence upon which a jury could convict the Defendant of burglary, vandalism, and theft.

The evidence, considered in the light most favorable to the State, proves that the Defendant worked for a brief period of time at a farm property on Mullins Mill Road and was familiar with the property and the items stored there. The Defendant's employment was terminated "not under the friendliest terms" for failure to finish a job he had already been paid to complete. The Defendant approached McCullough about an opportunity to make some money by loading some four-wheelers for his former employer, and the two then drove over to the Mullins Mill Road property after dark on the night of July 14, 2009. Without Mr. Pope's permission, the Defendant broke the gate to enter the property, and, with McCullough's help, unloaded lumber from a trailer parked outside the barn and then loaded the trailer with two four-wheelers, a lawn mower, and a weed eater. The four-wheelers, mower, and weed eater were valued at almost $15,000. The Defendant and McCullough left the Mullins Mill Road property, damaging a fence post as they drove out, and went to another location to sell some of the property. The Defendant received the proceeds from this sale. After selling some of the property, they returned to McCullough's home and sold one of the four-wheelers to Mills. The money from this transaction was received by McCullough. The four-wheeler sold to Mills was spray-painted black before leaving the premises because it was stolen. The other four-wheeler was taken the next day by the Defendant to be sold, and McCullough sold the trailer to someone in town. The Defendant admitted to his girlfriend he took the items because his prior employer owed him money. He threatened both Stringer and Rogers not to tell that they had seen the stolen items the night of July 14, 2006.

We conclude that sufficient evidence was presented for the jury to find the Defendant guilty beyond a reasonable doubt of burglary, theft over $10,000, and vandalism under $500. As such, the Defendant is not entitled to relief on this issue.

B. Sentencing

On appeal, the Defendant contends that the trial court erred in determining the range and length of the Defendant's sentence. The State counters that the trial court correctly determined the Defendant's range and properly ordered consecutive sentencing based upon the Defendant's extensive criminal history.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts (2006). This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the Sentencing Act, the appellate court may not disturb

the sentence even if a different result was preferred. Tenn. Code Ann. § 40-35-103 (2006); *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 4-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2006).

1. The Defendant's Offender Status

The Defendant challenges the trial court's determination of his offender classifications for his burglary and theft convictions because the trial court considered each of his six prior felony convictions as separate convictions. The Defendant argues that the two forgery convictions occurred on consecutive days and that the record does not contain proof that they did not occur within the same twenty-four hour period. Therefore, the Defendant contends the trial court should have treated the two convictions as one. He further asserts that three of his prior felony convictions were the result of a "single course of conduct" and should, therefore, be treated as one felony. The State contends that the Defendant was sentenced appropriately as to both the range and length of sentence.

Tennessee Code Annotated section 40-35-107 addresses sentencing a defendant as a "persistent offender." To classify a defendant as a "persistent offender," the trial court must first find that the defendant has five or more prior felony convictions that are either in the same class as the current conviction, a higher class, or within two felony classes lower than the current conviction. T.C.A. § 40-35-107(a)(1) (2006). To classify a defendant as a "career offender" when the conviction is a class D or E felony, the trial court must find that the Defendant has six or more felony convictions. T.C.A. § 40-35-108(a)(3) (2006). The statute describes how the trial court is to determine how many prior felony convictions the defendant has received. The section relevant to the Defendant's argument in this case is section (b)(4) of both statutes:

> Except for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury, or threatened bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions.

T.C.A. § 40-35-107(b)(4); T.C.A. § 40-35-108(b)(4) (2006).

In seeking application of the twenty-four hour rule, it is the defendant's responsibility to establish that offenses that were committed on consecutive days occurred within twenty-four hours of each other. *State v. Gregory L. Sain*, No. M2006-00865-CCA-R3-CD, 2008 WL 624924, *12 (Tenn. Crim. App. at Nashville, Mar. 6, 2008), *perm. to appeal denied* (Tenn. July 7, 2008); *State v. Freddie T. Inman, Jr.*, No. W2004-02371-CCA-R3-CD, *10 (Tenn. Crim. App. at Jackson, Mar. 30, 2005), *perm. to appeal denied* (Tenn. Aug. 29, 2005); *see also State v. John Roy Polly,* No. M1999-00278-CCA-R3-CD, 2000 WL1606586, *3 (Tenn. Crim. App. at Nashville, Oct. 27, 2000) (holding that "where the defendant seeks the application of the twenty-four hour rule and the relevant convictions occur on different days, it is the defendant's responsibility to demonstrate that the two offenses occurred within twenty-four hours of each other").

The trial court examined the Defendant's criminal history within the context of the statute governing classification. The two counts of forgery were committed on consecutive days, and the Defendant produced no evidence at the sentencing hearing that these two charges occurred within twenty-four hours of one another. Although, it is possible for two criminal incidents to occur on consecutive days and within twenty-four hours of one another, it is the Defendant's responsibility to prove the incidents occurred within this time frame. In this case, the Defendant did not carry his burden of proof; therefore, the trial court properly considered each of the forgery convictions as a separate offense.

The Defendant's conviction for evading arrest with risk of death and two counts of reckless endangerment also occurred on the same day. Reckless endangerment occurs when a defendant recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury. T.C.A. §39-13-103(a) (2006). The definition of felony evading is:

> (b)(1) It is unlawful for any person, while operating a motor vehicle on any street, road, alley, or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop.
>
> . . . .

> (3) A violation of subsection (b) is a Class E felony unless the flight, or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony.

T.C.A. § 39-16-603(b)(1)(3) (2006). Bodily injury or serious bodily injury are elements of a class D felony evading arrest and reckless endangerment Therefore, we conclude that, under the exception in the statute for crimes with statutory elements including bodily injury or serious bodily injury, the trial court properly considered the two felony convictions separately for sentencing purposes. As such, we conclude the trial court properly found the Defendant a Range III persistent offender for the burglary conviction and a career offender as to the theft conviction. The Defendant is not entitled to relief on this issue.

2. Consecutive Sentencing

The trial court, after determining the Defendant's classification, ordered that the sentence of eleven months and twenty-nine days for the vandalism conviction and the sentence of twelve years for the burglary conviction be served concurrently and the sentence of fifteen years for the theft charge to be served consecutively, which the Defendant asserts is excessive.

A trial court may impose consecutive sentences if the state proves by a preponderance of the evidence that the offender meets at least one of the criteria listed in the consecutive sentencing statute. T.C.A. § 40-35-115 (2006). In the case under submission, the trial court found that the Defendent met criteria (2), that the Defendant was a "an offender whose record of criminal activity is extensive." *Id*. Consecutive sentencing is guided by sentencing guideline principles providing that the aggregate sentence imposed is the least severe measure necessary to protect the public from the defendant's future criminal conduct and bears some relationship to the defendant's potential for rehabilitation. *State v. Imfeld*, 70 S.W.3d 698, 706 (Tenn. 2002); *State v. Desirey,* 909 S.W.2d 20 (Tenn. Crim. App. 1995); *See* T.C.A. § 40-35-102 and -103 (2006).

After the sentencing hearing, the trial court sentenced the Defendant as a career offender, to twelve years for his burglary conviction and as a Range III, persistent offender, to fifteen years for his theft conviction. Finding that the Defendant had an extensive criminal record, the trial court ordered the vandalism conviction and burglary conviction to run concurrently and the theft conviction to run consecutively to the other convictions for a total effective sentence of twenty-seven years.

The Defendant was twenty-seven years old at sentencing, and he acknowledged both at trial and at the sentencing hearing that he had an extensive record. In addition to the six prior felony convictions the trial court considered in determining range, the Defendant has prior misdemeanor convictions for stalking, contributing to the delinquency of a minor, driving on a revoked license, and

twenty-four convictions for passing a worthless check. We conclude the record in this case supports the trial court's finding that the Defendant has an extensive criminal history.

In making the determination to order partial consecutive sentencing, the trial court considered both the need to protect the public from future criminal conduct by the Defendant and the Defendant's potential for rehabilitation. The Defendant's criminal record indicates a pattern of crime consistent with dishonesty and theft, similar to the crimes for which the trial court sentenced the Defendant in this case. The trial court, in considering the Defendant's potential for rehabilitation, specifically noted that the Defendant had committed additional crimes while on probation or parole and that, most recently, the Defendant has added two new charges while on bond for the charges in this case. The trial court found the Defendant a "very high risk" to be a repeat offender and, thus, found the existence of a need to protect the public from the Defendant's future criminal conduct.

Based upon this evidence, we find that the evidence does not preponderate against the trial court's finding that the Defendant has an extensive criminal record. Further, we conclude that both the Defendant's potential for rehabilitation and risk of future criminal activity support the trial court's order of consecutive sentencing under criteria (2). T.C.A. §40-35-115(2). Thus, the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that sufficient evidence was presented for a jury to find the Defendant guilty of burglary, theft and vandalism. Also we conclude the trial court properly sentenced the Defendant. As such, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE